IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 14953 of 2003
with
SPECIAL CIVIL APPLICATION No 15048 of 2003
with
Special Civil Application No. 15059 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE M.R. SHAH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHIVJIBHAI LADHABHAI SORATHIYA

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 14953 of 2003
MR NV ANJARIA for Petitioner No. 1-7
Mr. S.N. Shelat, Advocate General with Ms. Maithili Mehta, AGP for Respondent No. 1
MR NIKHILESH J SHAH for Respondent No. 2
NOTICE SERVED BY DS for Respondent No. 3-4

CORAM : HON'BLE MR.JUSTICE M.R. SHAH

Date of decision: 17/03/2005

ORAL COMMON JUDGEMENT

As common question of law and facts arise in all the 3 matters, these petitions are being disposed of by this common order.

2. In all these petitions, respective petitioners had originally prayed for an appropriate writ, direction or order permanently restraining the respondent Area Development Authority not to proceed and to take any forcible action and to take possession of residential units belonging to the petitioner situate in Ward No.8 in Sorathiya Naka area, Anjar-Kutch and to restrain them permanently from implementing the Town Planning Scheme No.4 qua the said residential premises of the petitioner. It is also further prayed to declare Town Planning Scheme No.4 framed for the town of Anjar as ultra vires and violative of Articles 14 and 16 of the Constitution of India in so far as it relates to the residential properties belonging to the petitioners. After the matter was heard at length in the course of arguments the learned advocate appearing on behalf of the petitioners had submitted draft amendment. It is also prayed to declare the petitioners as lessee occupants of the properties occupied by them in City Survey No. 3648 in Ward No.8 in Town Planning No.4 in the area known as Sorathiya Naka in capacity of owners of superstructures/buildings/houses thereto and are entitled to allotment of final plot and payment of compensation under town planning Act, and further that they are the holders of property entitled to be treated as so entitled under the provisions of the Gujarat Town Planning and Urban Development Act, 1976. [hereinafter referred to as the "Act"]. A further prayer is also sought for to require the respondents herein to propose appropriate variation in the T.P. Scheme No.4 in so far as it relates to the properties bearing Municipal Nos. 154, 154/1 to 154/6 occupied by them in the land bearing City Survey No. 3648 in Ward No.8 in T.P. Scheme No.4 in the area known as Sorathiya Naka Area, Anjar-Kachchh so as to recognize the rights of the petitioners as owners-occupiers under the said Act.

3. It is required to be noted that the Special Civil Applications were filed in the year 2003 and the Draft Amendment is proposed in the month of March 2005, more particularly when the petitions are heard at length for a considerable time and during the midst of the argument the amendment is proposed. Under the circumstances, the prayer of the petitioners to amend the present Special Civil Applications, which is proposed as stated hereinabove, deserves rejection on the following grounds;

(i) The Draft Amendment is not on Affidavit;

(ii) The amendment is sought after the matter was partly heard at length, and during the course of the argument the amendment is submitted;

(iii) Copy of the Draft Amendment is also not given to the learned advocate appearing for the respondents;

(iv) Amendment is sought after a period of 2 years and as stated hereinabove after the matter is partly heard at length it is submitted at a belated stage during the midst of arguments; and

(v) If the amendment which is sought for is granted, the entire complexion and the nature of the petition is likely to be changed as altogether new prayers are sought.

However, in view of the fact that the learned advocate appearing on behalf of the petitioners had argued all the aforesaid points in support of his prayers the Draft Amendment is allowed.

4. It is the case of the petitioners of Special Civil Application No. 14953 of 2003 that ancestral property of father of the petitioner No.1, i.e., Ladhabhai Valabhai situate in Ward No.8 of town of Anjar comprised in the residential houses constructed on the land bearing Survey No. 3648 admeasuring 455.14 sq.mtrs. owned by him and the land admeasuring about 710 sq.mtrs. occupied in the capacity of lessee of respondent No.4, i.e., Anjar Municipality under a lease lawfully granted before 25 years and on these lines, residential houses bearing Municipal Property No. 152, 152/1 and 154/22 were situate and that the said residential properties were occupied by the respective family members and they had been residing there. It is the case of the petitioners as regards the lands under lease that the lease was granted by the respondent No.4 Anjar Municipality and that they have put up superstructure upon the said land. The property bearing Municipal No. 152 is a separate municipal house and Municipal Nos. 154/9 to 154/14 are six different residential units which are subject matters of present Special Civil Applications. It is the case of the petitioners that the said units are occupied by the petitioners no. 2 to 9 respectively.

5. It is the case of petitioners of Special Civil

Application No. 15048 of 2003 that petitioners No. 2 to 8 are in occupation and possession of residential units bearing Municipal Properties No. 154/1 to 154/6. The land upon which the superstructure of aforesaid residential units is there was leased by the respondent No.4 Anjar Municipality in favour of favour of petitioner No.1.

6. It is the case of petitioners of Special Civil Application No. 15059 of 2003 that similarly the petitioners No. 2 to 12 were in occupation and possession of the residential units bearing Municipal Properties No. 152/1 to 154/7, 154/8, 154/15 to 154/22 and that the said residential units were on the land owned by the respondent No.4 Municipality and leased in favour of father of petitioner No.1. It is the case of the petitioners that the petitioners have constructed superstructures upon the land leased by the respondent No.4 Municipality and thus they are owners of the superstructures.

7. Thus it is the contention on behalf of the respective petitioners that petitioner No.1/respective petitioners were the lessees of the land belonging to and owned by respondent No.4 Anjar Municipality upon which they have put up superstructures and as such owners of the superstructures.

8. It is the case of petitioners of Special Civil Application No. 14953 of 2003 that in the Earthquake of 26th January 2001 the aforesaid residential properties bearing Municipal Nos. 154/6 to 154/14 suffered damages; the petitioner No.1 addressed the letter dated 22.5.2001 to the Mamlatdar requesting him to do survey of houses in view of the fact that some of the occupant petitioners who were staying there had left on account of Earthquake; that their names were required to be considered as occupiers; and that the competent authority has classified the said residential properties in G-4 category. It is the case of the petitioners that G-4 category denotes that the property can be rectified and after strengthening repair work they are entitled to compensation for damage of their property as per policy of the State Government; for which the petitioners had applied and they received 1st instalment; that after adding some amount they undertook repairs of the residence which are now fit for rehabilitation; and they are residing there. It is the case of the petitioners that subsequently by letter dated 18.11.2001 and by letter dated 7.1.2002 the respective petitioners have applied for getting 2nd and 3rd installments of

compensation. It is the case of petitioners that petitioner No.1 is the lawful owner and rest of the petitioners are family members and occupiers of the said properties. It is the case of the petitioners that in the post-Earthquake rehabilitation planning the State authorities invoked the provisions of the Act and their aforesaid properties became subject matter of Town Planning Scheme No.4 framed for the City of Anjar. It is the case of petitioners that petitioner No.1 is the owner within the meaning of Section 2(xviii) and other petitioners are occupiers within the meaning of Section 2(xvi) of the Act.

9. It is the case of petitioners of Special Civil Application No. 15048 of 2003 and Special Civil Application No. 15059 of 2003 that in the Earthquake of 26th January 2001, the residential properties occupied by them also suffered damages; petitioner No.1 addressed a letter to the Mamlatdar requesting him to do survey of houses in view of the fact that some of the occupant petitioners staying there had left on account of Earthquake; that their names were required to be considered on record as occupiers; thereafter the competent authority has classified the said residential properties in G-5 category; accordingly all the residential units have been grounded; land is an open land; and each of the occupant petitioners had shifted their residence and they are staying elsewhere. It is the case of the petitioners that as occupants of properties each of them has applied for compensation but they have not received any compensation. It is the case of petitioners that in post-Earthquake Rehabilitation Planning the respondent State authorities had invoked provisions of the Act and their aforesaid properties became subject matter of Town Planning Scheme No.4 framed in the city of Anjar.

10. It is the common contention and submission on behalf of the petitioners of all the three Special Civil Applications that neither the petitioner No.1 or any other petitioner had received any notice at any point of time under the Gujarat Town Planning Act and the Rules to the effect that their properties were subjected to town planning and in what manner. However, since the other property was subjected to Town Planning Scheme No.4 and when the Maps were notified having sensed that their aforesaid properties may also be adversely affected the petitioner No.1 lodged his own objections and on behalf of occupiers and all family members by two letters dated 5.6.2002 addressed to respondent No.2 authority and the authority never responded inspite of the objections

concerning Municipal property occupied by the respective petitioners by way of residential units on the land which was leased by the respondent No.4 Anjar Municipality and the petitioner was called personally to submit objection in respect of other property bearing City Survey No. 3648 which was owned by him and which was also falling in the said Town Planning Scheme No.4, and again on 7th September 2002 the petitioner No.1 submitted objections about the abovesaid properties and making the grievance that no notice of whatsoever nature was given in respect thereof. It is the case of the petitioners that the petitioners were not aware anything about the proposals of the Town Planning Scheme qua their properties until recently the servants and officers of the respondent threatened the petitioners for dispossession and/or demolition of their superstructures to implement the Town Planning Scheme No.4, the petitioners preferred the present Special Civil Applications for the aforesaid reliefs.

11. Shri NV Anjaria, learned advocate appeared on behalf of the petitioners. Shri Anjaria had submitted that though the petitioners are the occupiers and owners of the superstructures erected on the land which is going under six metres wide town planning road no notices have been issued upon the petitioners before implementing and finalising the Town Planning Scheme as required under Section 52 of the Act read with Rule 26 of the Gujarat Town Planning Rules {hereinafter referred to as "the Rules"}. It is also further submitted that as the petitioners are owners of the superstructure upon the land and the petitioners are the lessees the petitioners are entitled to the land as owners of the land which is required to be given under the provisions of the Act and/or the petitioners are entitled to compensation for the superstructures. Relying upon provisions of Section 2 sub-section (xii), Section 2 sub-section (xiii), Section 2 sub-section (xvi), sub-section (xviii) of Section 2, and sub-section (xix) of Section 2, it is the contention on behalf of the petitioners that as they are the owners of superstructures they are to be treated as owners of the land; and whenever there is a reference to owner of the land in the Act and the Rules either for the purpose of giving notice considering objections, for giving compensation and/or giving alternative land in lieu of the land which is going under the six feet wide road under the finalised town planning scheme the petitioners' rights are to be recognised and the petitioners are to be treated as owners of the land and petitioners are entitled to all such rights which are accruing in favour of owner of the land wherever there is

a reference to the owner of the land in the Act. Sub-section (xii) of Section 2, sub-section (xiii) of Section 2, sub-section (xvi) of Section 2, sub-section (xviii) of Section 2, and sub-section (xix) of Section 2, read as under;

(xii) "final plot" means a plot reconstituted from an original plot and allotted in a town planning scheme as a final plot;

(xiii) "land" includes benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth;

(xvi) "occupier" includes,__

(a) any person who for the time being is paying or is liable to pay to the owner the rent of the land or building in respect of which such rent is paid or is payable;

(b) an owner living in or otherwise using his land or building;

(c) a rent free tenant;

(d) a licencee in occupation of any land or building;

(e) any person who is liable to pay to the owner damages or compensation for the use and occupation of any land or building;

(xviii) "owner" in relation to any property, includes any person who is, for the time being receiving or entitled to receive, whether on his own account or on account of or on behalf of, or for the benefit of, any other person or as an agent, trustee, guardian, manager or receiver for any other person or for any religious or charitable institution, the rents or profits of the property; and also includes a mortgagee in possession thereof;

(xix) "plot" means a portion of land held in one ownership and numbered and shown as one plot in a town planning scheme.

Relying upon the aforesaid Sections, more particularly sub-section (xiii) of Section 2, which defines "land" which includes benefits arise out of land and the things attached to the Earth or permanently fastened to anything attached to the Earth, the learned advocate for the petitioners has submitted that as the superstructures on the land are attached to the Earth the same be treated as land and therefore as owner of superstructures the petitioners are to be treated as owners of the land for the purposes of the Act. It is therefore submitted that as the petitioners are not given any notices to represent their case or to submit their objections which is required under Section 52 of the "Act" read with Rule 26 of the "Rules" the town planning scheme as such is bad in law and therefore the action of the respondents in issuing notices upon the petitioners directing the petitioners to hand over possession of the land which is going under six metres wide town planning road requires to be quashed and set aside.

12. Shri Anjaria, learned advocate appearing for the petitioners has further submitted that as per the Final Town Planning Scheme for the purpose of implementation of the Town Planning Scheme No.4 the superstructure of the petitioners are likely to be demolished and therefore they will be affected by the scheme and therefore they were required to be given special or individual notices as required under Section 52 of the Act read with Rule 26. For that purpose, Shri Anjaria has relied upon the Judgment of the Hon'ble Supreme Court in the case of Jaswantsingh Mathurasingh Vs. Ahmedabad Municipal Corporation, reported in 1992 Supplementary (1) SCC Page 5. Relying upon the said judgment the learned advocate appearing for the petitioners had also submitted that as directed by the Hon'ble Supreme Court in the aforesaid decision even the tenants who were likely to be affected due to the scheme and their shops were likely to be demolished are entitled to alternative suitable shops.

12.1 Relying upon the Judgment of the Assam High Court in the case of Niresh Chandra Das-Judgment Debtor, Appellant Vs. Paresh Chandra Routh, Decree-holder, Respondent, reported in AIR 1959 Assam 61, the learned advocate appearing for the petitioners has submitted that right of a tenant to remain in possession is held to be saleable property and therefore the petitioners are entitled to alternative plot as the petitioners would be deprived of their right to remain in possession as tenants.

13. An affidavit-in-reply is filed on behalf of the

respondent No.2, Area Development Authority. It is submitted that the Area Development Authority followed the procedure as laid down under the Act for the town planning scheme at Anjar and the preliminary town planning scheme has already been sanctioned by the State Government on 21.1.2003 and therefore as per the provisions of Section 67 of the Act all the lands required by the appropriate authority shall vest absolutely in the appropriate authority free from all encumbrances and all the rights in the original plots which have been reconstituted in the final plots shall be determined by the Town Planning Officer. It is also further submitted that as such no malafides are alleged and there is no malafide intention on the part of Area Development Authority in preparing the Town Planning Scheme. It is submitted that there has been vast destruction of human life and property in the area due to devastating Earthquake on 26.1.2001 due to which people were buried in debris of the buildings and of narrow streets, and after the Earthquake the Government and NGOs had immediately started rescue operation, but due to narrow streets Government machinery could not reach through the streets to work in the city and start rescue operation in time, as a result whereof many people lost their lives. Therefore the Government decided to constitute a Special Planning Committee for the affected walled areas of Bhuj, Anjar, Bachhau and Rapar under the Act. It is also further submitted that the Town Planning Act came to be amended and as per the amended Town Planning Act which was amended by Notification dated 9.5.2001 the Anjar Area Development Authority came to be constituted and as required under Section 41(1) of the Act the Area Development Authority consulted the Chief Town Planner before the declaration of the intention and after consulting the Chief Town Planner vide Resolution dated 3.5.2002 of the Area Development Authority the declaration of intention to prepare town planning scheme No.1 to 4 came to be declared and the said declaration of intention was published in the Gujarat Government Extraordinary Gazette dated 4.5.2002 as required under Rule 16(1) of the Rules. It is also further submitted that the declaration of intention to prepare Town Planning Scheme No. 1 to 4 was published in local newspaper dated 19.5.2002 as required under Rule 16(5) of the Rules and the said advertisement was also pasted in the public places conspicuous within the area of town planning scheme and at the head office of the Area Development Authority as required under Rules 16(1). It is also further submitted that as required under Rule 16(2) of the Rules an announcement was made in the advertisement published in the aforesaid newspaper that a

copy of plan of the area of Draft Town Planning Scheme will be kept open at Area Development Authority's office. It is further submitted that as required under Section 41(2) of the Act copy of the advertisement publishing declaration of intention was despatched to the State Government along with the plan as referred to in the said Section. It is also further submitted that individual notices as well as public notices were given for owners meeting as per Rule 17 and accordingly the owners meeting was held on 23.5.2002 and tentative proposals of Draft Town Planning Scheme was explained to the owner of the land with the help of Map and on computer screen, and suggestions and objections were invited from the land owners and considering the suggestions and objections received by the Area Development Authority the plan was modified and accordingly by resolution dated 14.6.2002 a draft Town Planning Scheme was made by the Area Development Authority as required under Section 42(1) of the Act. It is also further submitted that as required under Section 42(1) of the Act and Rule 18(1) of the Rules the draft Town Planning Scheme was published in the Government Gazette on 27.5.2002 and in the local newspaper on 25.5.2002. It is further submitted that an announcement was made as required under Rule 18(1) in the aforesaid advertisement that the scheme would be kept open for public inspection at Head Office of Area Development Authority and the same was kept open at the said office. It is also further submitted that by the Amended Act of 2002 a Proviso came to be added to Section 47 of the Act whereby the time period for receiving suggestions/objections came to be reduced from one month to 15 days with a view to ensure time bound programme of rehabilitation; suggestions/objections were invited by giving 15 days' time and thereafter by resolution dated 28.6.2002 suggestions/objections received were considered as required under Section 47 of the Act and Draft Town Planning Scheme was modified accordingly and the draft town planning scheme was submitted to the State Government as required under Section 48(1) of the Act along with modifications and suggestions received by the Area Development Authority for its sanction; the draft town planning scheme came to be sanctioned by the State Government vide notification dated 17.7.2002; and thereafter as required under Section 50 of the Act Town Planning Officer came to be appointed by the State Government to finalise the Draft Town Planning Scheme and to submit a Preliminary Town Planning Scheme to the State Government for its sanction. It is also further submitted that thereafter the State Government has accorded sanction to the Preliminary Town Planning Scheme vide notification dated 21.1.2003. Thus, the Town

Planning Scheme has come into force with effect from 21.1.2003. It is further submitted that as contemplated under Section 67 of the Act all lands vest absolutely in the Area Development Authority free from all encumbrances with effect from 21.1.2003 and therefore the notice under Section 67 of the Act for vesting of the land in Area Development Authority was given to the petitioners, and in addition to that the information about vesting of the land in the Area Development Authority was widely published vide public notice in the local newspapers on 9.2.2003 and 14.2.2003 respectively and also on telephone and cable network. It is further submitted that as required under Section 68 of the Act and Rule 33(1)(a), notice came to be issued upon the petitioners for vacating the land and handing over possession of the land which is required for 6 metres wide road under final Town Planning Scheme to the Area Development Authority which is the subject matter of the present Special Civil Applications.

14. It is further submitted that the Asian Development Bank has provided funds for infrastructure development of the town planning scheme and as per the terms and conditions of the Asian Development Bank programme the work is to be completed within a scheduled time and therefore it is requested that if the status-quo/stay is continued for a longer time it will affect the finalisation of the town planning scheme and reconstruction of the roads and there will be breach of the time-bound programme. By the aforesaid submissions the respondents have come out with a case that they have followed the necessary procedure which is required to be followed under the Act and the town planning scheme has become final and the land in question on which the petitioners were having superstructure as lessee is earmarked for six metres vide town planning road. It is also further submitted that 374 suggestions/objections were received by the authority in response to various publications and those suggestions/objections came to be considered in detail by the authority in the Board Meeting held on 14.6.2002; the authority modified the draft town planning scheme and sent the same to the State Government for its sanction which came to be sanctioned by the State Government on 17.7.2002; and the land in question is required for laying six metres wide road for public purposes. It is further submitted that as such the petitioners being lessees have no right over the land in question and even the lease in favour of the petitioners is also not renewed by the respondent No.3 Nagarpalika for the period 1.4.2002 to 31.3.2003, and even thereafter, and even as per the conditions of lease

the petitioners do not have any permanent right over the lease land and they are required to hand over possession of the land to the Area Development Authority which is required for the purpose of six metres wide road. The learned advocates appearing on behalf of the respondents have submitted that the petitioners are not owners of the land; petitioners were the lessees of the respondent No.3 Nagarpalika and since their lease has not been renewed after 2002 they have no right to continue on the land in question, and in view of non-renewal of the lease which is not challenged by the petitioners and which is accepted by the petitioners they have no right to continue on the land in question. It is further submitted that the petitioners cannot be termed as owners of the land being owners of the superstructure as contended on behalf of the petitioners and therefore they are not entitled to the land and/or compensation as prayed for on behalf of the petitioners. It is further submitted that as the petitioners are not owners of the land they are not required to be given any alternative land in lieu of the land occupied by them which is going under the town planning scheme and that once the town planning scheme has become final it has become part of the Act and all lands vest in the Area Development Authority by virtue of Section 67 of the Act with effect from 21.1.2003 and therefore also they have no right to continue in the land in question, and therefore requested to dismiss the Special Civil Applications.

15. Referring to the contention made on behalf of the petitioners with regard to special notice or individual notice as per Section 52 of the Act read with Rule 26 of the Rules and the reliance placed upon the judgment of the Hon'ble Supreme Court in the case of Jaswantsingh Mathurasingh (supra), the learned advocate appearing for the respondents has submitted that the Judgment of the Hon'ble Supreme Court relied upon by the petitioners will not be applicable to the facts of the present case, as in that case the Hon'ble Supreme Court was considering the provisions of the Bombay Town Planning Act and the Rules and the provisions of law which were applicable at the relevant point of time, where the present case is governed by the provisions of the Gujarat Town Planning Act, 1976 and the Rules and both the provisions are different. It is also further submitted that the identical question came to be considered by the Division Bench of this Court in the case of Chandravadan Chunilal Shah Vs. State of Gujarat, reported in 2002(3) GLH Page 76, where, while considering the earlier judgment of this Court, this Court has held that special or individual notice is not required to be given to person affected by

the Town Planning Scheme. As regards the prayer of the petitioners relating to alternative accommodation, relying upon the judgment of the Hon'ble Supreme Court in the case of Jaswantsingh Mathurasingh (supra), it is submitted that the said judgment will not be helpful to the petitioners in the facts and circumstances, as in that case the Hon'ble Supreme Court was considering the provisions of the Bombay Town Planning Act and considering the provisions of the Bombay Town Planning Act and the Rules the Hon'ble Supreme Court has held that noncompliance of the requirements would vitiate the final scheme as there was noncompliance of Rule 21(3)(4) of the Rules. However, while directing the respondents to allot a suitable shop to a tenant who was running business premises in question for long, the Hon'ble Supreme Court did not interfere with the scheme on the ground of noncompliance of sub-sections (3) and (4). Thus, it is submitted that only with a view to see that the scheme is not interfered with which was found to be illegal, i.e., without complying with requirements in the facts and circumstances of the case, the Hon'ble Supreme Court has directed to allot a suitable shop. Therefore, it is requested that the petitioners are not entitled to any alternative land also as prayed for.

16. It is further submitted in the Affidavit-in-Reply that the land of City Survey No. 3648 owned by the petitioner No.1 admeasuring 455.14 sq.mtrs. is denoted as O.P. No. 552 and the same came to be included in the Draft and Preliminary Scheme No.4 of Anjar and in lieu of the said Original Plot reconstituting the Final Plot No. 552 admeasuring 351.29 sq.mtrs is allotted to the petitioner in the draft scheme and on considering the objections, suggestions, site situation and planning point of view the Town Planning Officer has declared/finalised the preliminary scheme and as per the sanctioned preliminary scheme the petitioner is allotted the reconstituted Final Plot No. 552 admeasuring 351.29 sq.mtrs in lieu of Original Plot No. 552 admeasuring 455.14 sq.mtrs. and the petitioner is allotted the plot in the same area as was allotted in the Draft scheme. It is further submitted that part of the land bearing City Survey No. 3648 Original Plot No. 552 is going for six metres wide town planning road and the land occupied by rest of the petitioners which was owned by the respondent No.4 Anjar Municipality and earlier leased by the Anjar Municipality in favour of petitioner No.1 and some portion of land bearing City Survey No. 3648, Original Plot No. 552 is allotted to various other persons who are affected by the Earthquake and whose properties have been fully damaged and who are required to be handed over

possession of the final plot which is allotted to them under the Town Planning Scheme and given compensation. However as the respective petitioners have not handed over possession of the land occupied by them the possession of the land is not allotted to those persons and that the 2nd and 3rd installments are not paid to them as they have not been able to put up any construction and the situation has come where other persons are required to return their 1st instalment and therefore it is requested to dismiss the present Special Civil Application and vacate the ad-interim relief granted earlier. It is further submitted that the petitioners being lessees have no right over the land in question and even as per the letter issued by the Chief Officer and Anjar Nagarpalika no land offered to any one on lease has been renewed after 1.4.2002 and in fact except in the matter of the Special Civil Application No. 14953 of 2003 there is no construction whatsoever and all the superstructures have been demolished and it is a open piece of land. Thus, even the superstructures which were owned by the respective petitioners of Special Civil Applications No. 14953 of 2003 and 15048 of 2003 are not in existence and what is in existence is the land owned by the respondent No.4 Anjar Nagarpalika. It is also submitted that so far as the superstructures in connection with Special Civil Application No. 14953 of 2003 are concerned they are six small rooms constructed by the petitioner No.1 on a land leased by the respondent No.4 Anjar Municipality which is not renewed by the Anjar Municipality.

17. Heard the learned advocates appearing on behalf of the parties. It is not in dispute that the petitioners were the lessees of the land owned by the respondent No.3 Nagarpalika and they are claiming to be owners of the superstructure. It is also not in dispute that their lease is not renewed on and after 1.4.2002. It is also not in dispute that the land in question upon which the petitioners are alleged to have erected shops/superstructures is going under six metres wide town planning road and the Town Planning Scheme has become final under the provisions of the Act. As per Section 67 of the Act on finalisation of the town planning scheme and after sanctioning of the preliminary scheme by the State Government all lands required by the Area Development Authority vest in the authority free from all encumbrances. Thus, by operation of law, the petitioners have no right to continue on the land in question on and from 21.1.2003, i.e., the day on which the preliminary scheme is sanctioned by the State Government. The contention on behalf of the petitioners, while relying

upon sub-section (xiii) of Section 2, that as they are owners of superstructure they are required to be considered as owners of the land for the purpose of considering their case under the Town Planning Scheme, has no substance. There is no construction and/or having any property permanently fastened to anything attached to the Earth. If the petitioners are owners of the superstructure, then they are required to take away the superstructure, and nobody has restrained them from taking away the superstructure. When a pertinent query was put to the learned advocate appearing for the petitioners that in a case where the lease in favour of the petitioners is validly terminated and/or not renewed and if the petitioners are required to vacate from the land, what will be the position of the superstructure and whether still they can insist to continue on the land in question which is not owned by them, the learned advocate appearing for the petitioners had no answer. Even as stated above, the lease is not renewed in favour of the petitioners after 1.4.2002. Considering the provisions of the Act and the definition of 'landowners', the petitioners cannot be considered to be owners of the land so as to give all the rights which are given to the owners of the land under the Act. As stated hereinabove, at every stage of Draft Town Planning Scheme as well as Preliminary Town Planning Scheme, suggestions and objections are invited by giving public notices in the local newspapers as well as affixing at conspicuous places and objections/suggestions are considered by the authority, and thereafter the scheme is sanctioned by the State Government. The contention on behalf of the petitioners that the petitioners were not served with individual notices and therefore the scheme is bad has no substance.

17.1. An identical question, whether the persons affected by the Town Planning Scheme are required to be served with special or individual notice as contemplated under Section 52 of the Act read with Rule 26(2) of the Rules or not and non-service of special or individual notice to the person affected by the Town Planning Scheme would vitiate the Town Planning Scheme or not, came to be considered by the Division Bench of this Court in the case of Chandravadan Chunilal Shah (Supra), and after considering the Judgment of the learned Single Judge of this Court [Coram: N.N. Mathur, J., as he then was] in the decision of Shilpa Park Housing Society, Surat 1996(2) GLR 707 in which the learned Single Judge relying upon the unreported judgment of the Division Bench of this Court rendered in Special Civil Application No. 1608 of 1979 on 20th April 1992, has held that

considering the provisions of Section 52 of the Act read with Rule 26, what is required under Section 52 is giving of a notice to the person affected by the scheme in the form and manner prescribed and the form and the manner for giving notice under Section 52 of the Act is provided in Rule 26 of the Rules of 1979 and Rule 26 of the Rules provides that the notice shall be published in the official gazette and in one or more Gujarati newspaper circulating within the area of the appropriate authority and shall be pasted in a prominent places at or near the areas comprised in the scheme and at the office of the Town Planning Officer. The Rule further provides that notice shall be in the Form 'H' and considering the aforesaid provision it is held that by not serving a special or individual notice upon the person affected by the Town Planning Scheme the scheme is not vitiated. So far as the reliance placed upon the judgment of the Hon'ble Supreme Court in the case of Jaswantsingh Mathurasingh (supra) is concerned, the same will not be applicable to the facts of the present case, as the said decision was rendered considering the provisions of the Bombay Town Planning Act and the Rules and the present case is governed by the provisions of the Gujarat Town Planning Act and the Rules thereof, and the provisions under both the Statutes are different. Another Division Bench of this Court has also, while considering the decision of the Hon'ble Supreme Court in the case of Jaswantsingh Mathurasingh (supra), while deciding the Special Civil Application No. 1608 of 1979 and considering the amendment in Bombay Town Planning Rules, more particularly amended Rule 21 which is para materia to the provisions of the Gujarat Town Planning Act and the Rules, i.e., Rule 26, held that the judgment of the Hon'ble Supreme Court in the case of Jaswantsingh Mathurasingh (supra) will not be applicable and individual/special notices are not required to be issued. Under the circumstances, the submission and contention on behalf of the petitioners to the effect that non-service of special or individual notices vitiated the scheme has no substance and the same is required to be rejected.

18. So far as the contention on behalf of the petitioners with regard to alternative land, relying upon the Judgment of the Hon'ble Supreme Court in the case of Jaswantsingh Mathurasingh (supra) by which the Hon'ble Supreme Court has directed to allot alternative shops to the tenants who were likely to be affected by the scheme is concerned, the said Judgment in the case of Jaswantsingh Mathurasingh (supra) will not be helpful to the petitioners, as the Hon'ble Supreme Court has not decided and held that in all cases where the land in

question which is needed for the implementation of the Town Planning Scheme is occupied by the tenants, the authority is required to allot alternative land and/or the shop to such tenants. The decision of the Hon'ble Supreme Court, in the aforesaid case, is dealing with the provisions of the Bombay Town Planning Act and the Rules and in a case where it was found by the Hon'ble Supreme Court that the scheme is vitiated because of noncompliance of the mandatory provisions of the Bombay Town Planning Act and the Rules and so as to see that the scheme is not declared invalid, the Hon'ble Supreme Court has directed to give alternative shop to the tenant. As such, as stated hereinabove, the scheme is not challenged by the petitioners, however, in view of the fact that the learned advocate appearing for the petitioners has argued and made submissions with regard to alternative land as well as compensation, this Court is considering the aforesaid argument also so that it may not be said that the learned advocate has argued and is not dealt with by this Court. The identical question came to be considered by the Division Bench of this Court, and while dealing with the rights of lessees, this Court has held as under;

> "Lastly, in the final town planning scheme as a general note it has been inter alia mentioned that all rights of lessors and lessees in the original plots are hereby transferred to the corresponding final plots irrespective of change in area except where otherwise specified in the remarks column. The learned Advocate for the petitioners relied upon this general note and submitted that the petitioners' right is saved and, therefore, the Municipality should be directed to hand over the possession of 12 ft. x 12 ft. area out of final plot No. 70 which is allotted to the original owner. In our view, this submission is totally devoid of any substance. The general notes are only to clarify that if rights of lessors and lessees are determined as per the provisions of section 32 clause (xii) read with section 68 of the Bombay Town Planning Act, 1954, those rights are saved and would stand transferred to the corresponding final plots. Further, this submission is totally misconceived because original plot is not reconstituted. The original plot which is reconstituted and given final plot No.I is reserved for the Municipality. The general notes do not provide that rights which are not specified or actually determined would also stand

transferred. Further, this contention, if accepted, would frustrate the whole scheme and it would be difficult to finalise and implement the town planning scheme. This we say because after finalisation of the scheme, number of disputes can be raised by the plot-holders whose lands are reserved for the public purpose or who are not allotted alternative land or who are allotted plot of smaller size, or by the tenants or sub-tenants to whom plots are not allotted or whose tenancy rights are not protected or that compensation awarded to them is less. In our view, these objections were required to be raised before finalisation of the town planning scheme. Therefore, to obviate these difficulties, section 53 of the Act, inter alia, provides that on the day on which the final town planning scheme comes into force all rights in the original plots which have been reconstituted shall determine and the reconstituted plots shall become subject to the rights settled by this Town Planning Officer. Under section 54 any person who is continuing to occupy any land which he is not entitled to occupy under the final scheme is required to be evicted by the local authority. Not only this, but under sub-section (3) of section 51 on and after the date fixed in such notification a town planning scheme shall have effect as if it were enacted in the Act. In view of section 51(3), the final town planning scheme is considered to be an enactment and, therefore, the Court cannot change it or modify it. Therefore, once we arrive at the conclusion that it was not necessary for the Town Planning Officer to issue a special notice as required under the unamended Rule 21(3), then in our view this Court would have no jurisdiction to give further direction that the petitioner's right ought to have been saved or ought to have been transferred to the corresponding final plot No. 70 by modifying final town planning scheme."

18.1. Considering the Judgment of the Division Bench of this Court as well as considering the provisions of the Gujarat Town Planning Act, in particular Section 67 of the Act, after the Town Planning Scheme has become final all lands which are needed by the Area Development Authority for the purpose of implementation of the Town Planning Scheme vest in the authority free from all encumbrances. Thus, on and after 21st January 2003, the

petitioners have no right, title or interest in the land in question, and by virtue of provisions of Section 67 of the Act, the land in question, which is needed for 6 metres wide road vest in the Area Development Authority and free from all encumbrances, and the petitioners have no right to continue in the land in question.

19. So far as the prayer of the petitioners to permanently restrain the respondents not to take any coercive action for taking possession of residential units occupied by them in Ward No.8 in Sorathiya Naka area and restrain them permanently from implementing Town Planning Scheme No.4 qua the said residential properties of the petitioners is concerned in view of the fact that the Town Planning Scheme No.4 has already become final and in the cases relating to Special Civil Application No. 14953 of 2003 and 15059 of 2003 there is no construction whatsoever as the entire construction has been demolished/damaged and it is a open piece of land which was leased by the respondent No.4 Anjar Municipality. Thus, so far as those petitioners are concerned, they were claiming to be owners of superstructures but those superstructures are not in existence at all, and even otherwise in view of Section 67 of the Act on finalisation of Town Planning Scheme all the lands needed by the Area Development Authority for the purpose of implementation of the Town Planning Scheme vest absolutely in the Area Development Authority free from all encumbrances and therefore also the petitioners have no right to continue in the said land which is required for the purpose of implementation of Town Planning Scheme.

20. So far as prayer of the petitioners for direction on the respondent No.2 Area Development Authority to propose variation to the State Government under Section 70 of the Act so as to redress the grievance of the petitioners raised in this petition and salvage the existing building structure/place of business bearing Municipal Case No. 9/913, 9/915 and 916, 9/912 and 9/911, is concerned, it is worthwhile to consider the provisions of Section 70 of the Act which reads as under;

"Sec.70. Power to vary scheme on ground of error, irregularity or informality.

(1) If after the preliminary scheme or the final scheme has come into force, the appropriate authority considers that the scheme is defective on account of an error, irregularity or

informality, the appropriate authority may apply in writing to the State Government for the variation of the scheme.

(2) If on receiving such application or otherwise, the State Government is satisfied that the variation required is not substantial, the State Government shall publish a draft on such variation in the prescribed manner.

(3) The draft variation published under sub-section (2) shall state every variation proposed to be made in the scheme and if any such variation relates to a matter specified in any of the clauses (a) to (h) of sub-section (3) of section 40, the draft variation shall also contain such other particulars as may be prescribed.

(4) The draft variation shall be open to the inspection of the public at the head office of the appropriate authority during office hours.

(5) Within one month of the date of publication of the draft variation, any person affected thereby may communicate in writing his objections to such variation to the State Government through the Collector and send a copy thereof to the appropriate authority.

(6) After receiving the objections under sub-section (5), the State Government may, after consulting the appropriate authority and after making such inquiry as it may think fit, by notification -

(a) appoint a Town Planning Officer and thereupon the provisions of this Chapter shall, so far as may be, apply to such draft variation as if it were a draft scheme sanctioned by the State Government, or

(b) make the variation with or without modification, or

(c) refuse to make the variation.

(7) From the date of the notification making the variation, with or without modification, such

variation shall take effect as if it were incorporated in the scheme."

It is only in a case where the appropriate authority considers that the scheme is defective on account of an error, irregularity or informality they may apply in writing to the Government for variation of the scheme. It is not the case here that the scheme is defective on account of an error, irregularity or informality as per the Area Development Authority. Even otherwise, it is ultimately for the Area Development Authority to move the State Government for variation. Under the circumstances, the prayer of the petitioners to direct the respondent No.2 to suggest for variation cannot be accepted and the same is rejected.

21. So far as the contention on behalf of the petitioners, with regard to allotment of final plot and payment of compensation under the Town Planning Scheme, relying upon the judgment of the Assam High Court in the case of Niresh Chandra V. Paresh Chandra (Supra), to the effect that the tenancy right is a property and that by virtue of implementation of Town Planning Scheme their superstructures would be demolished, is concerned, it is required to be noted that the lease period in favour of the petitioners has already expired and there is no lease at present in existence after 1.4.2002. If the petitioners are the owners of superstructures, then as such on expiry of the lease period they are required to vacate the premises and to take away the superstructures. Even otherwise, as stated hereinabove, the petitioners cannot be considered to be the owners of the land being owners of the superstructures. While considering the allotment of final plot and payment of compensation, the Town Planning Officer is required to consider and allot the final plot and determine the compensation to the original landowner. The question with regard to compensation is required to be considered by the Town Planning Officer under Section 53 of the Act and even nothing is on record to show what would be the damages and/or compensation. If at all the petitioners are of the opinion that they are entitled to the compensation, the remedy was to approach the Town Planning Officer for the purpose of determining compensation, if any, however, the present petition under Article 226 of the Constitution of India, where initially only notices under Section 68 of the Act read with Rule 33 are challenged, is not required to be entertained.

22. It is required to be noted as it appears from the record that the residential units occupied by the respective petitioners were on the land in two parts, one upon the land owned by father of the petitioner No.1, and another upon the land owned by respondent No.4 Anjar Municipality leased in favour of father of petitioner No.1. The land bearing City Survey No. 3648 admeasuring 455.14 sq.mtrs. was of the ownership of father of petitioner No.1 and some of the residential units occupied by rest of the petitioners except petitioner No.1 were on the land owned by respondent No.4 and leased to the father of petitioner No.1. Thus, in short they were the lessees and as stated above the fact that even though their lease period was over which is not renewed is accepted by the respective lessees. Under the circumstances even otherwise they do not have any right to continue on the land in question as lessees claiming to be owners of the superstructures. As stated above, so far as the superstructures and residential units occupied by the respective petitioners of Special Civil Applications No. 15048 of 2003 and 15059 of 2003 are concerned, the same are not in existence and the land is an open piece of land. Thus, even the superstructure owned by those petitioners are not in existence and it is now an open piece of land. Thus, even the superstructures owned by those petitioners are not in existence and it is now an open piece of land which is required by the Area Development Authority for the purpose of allotment to other persons by way of final plots under the finalised Town Planning Scheme who are waiting for having possession and to get 2nd and 3rd installments with regard to their properties which are already destroyed and damaged fully in the Earthquake of 26th January 2001. It is required to be noted that those persons who are allotted final plots from the land occupied by the respective petitioners and who are directly affected are not joined as party-respondents in the present Special Civil Application. If any relief is granted in favour of the petitioners in the present Special Civil Application, then those persons are likely to be affected directly and they are not parties before this Court. Under the circumstances, no relief in favour of the petitioners can be granted in absence of those persons who are likely to be affected.

23. It is required to be noted at this stage, that the Asian Development Bank has provided funds for infrastructural development and as per the conditions of the Asian Development Bank programme, the work is required to be completed within a stipulated time and any impediment therein will lead to breach of terms and

conditions of the loans given by World Bank. It is required to be noted that other persons are allotted land under the finalised Town Planning Scheme and land is required to given from the land originally occupied by the respective petitioners which was leased to them by the respondent No.4 and owned by the respondent No.4 Anjar Municipality. Those persons have lost their properties and residential houses and they are affected due to Earthquake. As per the policy of the State Government they are entitled to compensation who are already paid the 1st instalment and they are required to be paid the 2nd and 3rd installments on getting possession of land and on putting up construction. Because of the pendency of the present Special Civil Applications and because of not handing over of possession of the lands in question by the respective petitioners, those affected persons are the ultimate sufferers who are not in a position to get their 2nd and 3rd installments. As stated hereinabove, the Asian Development Bank has provided funds for infrastructural development and rehabilitation and there is a time limit fixed with regard to even payment of compensation also. It appears that this is an attempt on the part of the petitioners to delay the implementation of the Town Planning Scheme which has become final and therefore even considering the plight of those affected persons who are not before this Court, the present Special Civil Applications are required to be dismissed.

24. For the reasons stated hereinabove, all the Special Civil Applications are required to be dismissed and are hereby dismissed. The ad-interim relief granted earlier is required to be vacated. However, at this stage, the learned advocate appearing on behalf of the petitioners requests to continue the order of status-quo granted earlier by this Court, in view of he fact that the Town Planning Scheme in question is required to be finalised as the Asian Development Bank has provided funds for infrastructural facilities in respect of the Town Planning Scheme and there is a deadline fixed by the Asian Development Bank and according to its programme the work is required to be completed within a stipulated time, it would not be in the interests of public at large to continue the order of status-quo for a longer period. However, in the facts and circumstances of the case and in view of the fact that the order of status-quo is continued since 2003, the same is directed to be continued for a further period of six weeks.

rmr. [M.R. Shah, J.]